No. 4093

In the United States Circuit Court of Appeals

For the Ninth Circuit

BLANCHE CASCADEN, as administratrix of the estate of DAVID H. CASCADEN, deceased, (substituted plaintiff for DAVID H. CASCADEN and BLANCHE CASCADEN, as guardian of the estate of DAVID H. CASCADEN, an insane person), *Plaintiff in Error*

vs.

GEORGE WEBER, *Defendant in Error*

Reply Brief of Plaintiff in Error

Upon Writ of Error to the United States District Court of the Territory of Alaska, Fourth Division

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Reply Brief of Plaintiff in Error

Upon Writ of Error to the United States District Court of the Territory of Alaska, Fourth Division

Defendant on page 1 of his brief, says:

"On page 4 of plaintiff's brief occurs this statement:

" 'But the latter note was given plaintiff in error merely as security for the payment of the $3000 note.' This is plaintiff's contention but the contention is not supported by any evidence."

There is no evidence in the record that the Fairbanks Beverage Company note was given as absolute payment of the bank note which Cascaden paid, and in the absence of such evidence, the law presumes that such note was given Cascaden as security for the disbursement made by him in paying the bank note on which he was merely surety.

"There is no doubt that a negotiable bill or note given for or on account of a contemporaneous or pre-existing debt, and whether or not it be in renewal of a previous bill or note, suspends all right of action on such debt during its currency—that is, until it is dishonored by non-acceptance or non-payment. If this were not so, the creditor who took the additional security, in the form of a bill or note, might in consequence of its negotiable character, transfer it to a bona fide holder and subject the debtor to payment of both the original and the new debt.

"But as soon as the bill or note is dishonored, the original debt revives and the creditor may pursue his remedy for it, or sue upon the bill or note. The bill or note taken in conditional payment becomes by its dishonor a collateral security, which the creditor may retain and endeavor to collect without forfeiting the right to proceed in the principal cause of action, subject to the obligation of surrendering up the bill or note at the trial."

Daniel on Negotiable Instruments, (4th Ed.), Vol. 2, Sec. 1272.

Keyser v. Hinkle, 106 S. W. 98 at 101.
Black v. Sippy, 16 Pac. 418 at 419.
8 C. J., Sec. 793, pp. 569-572 incl.

We wish to call the attention of the court to an erroneous citation on page 13 of our original brief. The citation should be 8 Corpus Juris, section 794, page 572, instead of page 996.

Defendant, pages 1 and 2 of his brief, states:

"And on page 5 of plaintiff's brief occurs this statement:

" 'But that note was given the defendant in error to indemnify him against liability on a note of one Frank Allberg against defendant in error and one David Petree.'

"The evidence shows that the $2000 note was given for money owed by Petree to Weber and that Cascaden was a co-maker. There is no evidence that the note was not to be paid unless or until Weber paid the Allberg note."

Plaintiff testified without objection (Tr. 71), in response to the following questions:

"Q. What does that say?

"A. Well, I have $3000 Weber and Petree; $3000 paid afterwards Dave Cascaden; $3000 still due Allberg. $2000 was to secure George in 1918, February 6th, when he left for outside, against balance of $3000 note to Allberg. Firm was to pay Allberg $3000 but has nothing to show.

"Q. Directing your attention to this part of the memorandum that says '$2000 was to secure George in 1918, February 6th, when left for the outside, against balance of $3000 note to Allberg.' Did Mr. Weber make that statement to you at that time?

"A. He did, Mr. Clark.

"Q. And you were referring to that $2000 note that he has set up in his answer in this case?

"A. Yes, sir; that is the note."

Plaintiff made a memorandum of the conversation that she had with the defendant in the spring of 1922, relative to the $2000 note pleaded as counter-claim (Tr. 70), and the plaintiff testified from such memorandum without objection.

For the purpose of determining whether or not the court erred in directing a verdict in favor of the defendant on the counter-claim, plaintiff's testimony regarding defendant's admissions and declarations must be accepted as true. What did defendant mean when he said: "The $2000 note was given to me to secure me against balance of $3000 note due Allberg"?

Manifestly, to secure him against liability on the Allberg note, that is, if he were compelled to pay the Allberg note, he would be reimbursed by Petree and Cascaden to the extent of the $2000 note pleaded

by defendant as a counter-claim. We will discuss this matter more at length in reply to the portion of defendant's brief which deals specifically with plaintiff's defense to defendant's counterclaim.

Defendant contends (brief, pages 2-6), that defendant's exhibit 7 (Tr. 128, 129 and 130), shows that Cascaden accepted the Beverage Company note as absolute payment of the bank note which Cascaden paid, and defendant further asserts (brief, pages 5 and 6), that exhibit 7 makes the verity of four propositions, which he enumerates (brief, pages 5 and 6), apparent. But there is no evidence in the record that there was any agreement or understanding at any time between the defendant and Cascaden, or between Cascaden and the Beverage Company, that the latter's note should be accepted by the former as absolute payment of the bank note. The fact that the Beverage Company note was secured by mortgage is no evidence that the same was accepted by Cascaden as absolute payment.

8 C. J., Sec. 793, pp. 569-572.

Reynolds v. Schade, 109 S. W. 629.

It is true the Beverage Company was interested in the release of the mortgage which secured the payment of the bank note. It was not, however, financially interested in the payment of that note, be-

cause it was not liable for its payment. But in order to procure an additional loan from Cascaden, and the discharge of the mortgage securing the bank note, it was willing to give a note secured by first mortgage for the loan to be obtained from Cascaden, and a note secured by second mortgage for the amount of the bank note. Such attitude by the Beverage Company and Cascaden is no evidence that there was any understanding or agreement between them that the latter would accept the Beverage Company note secured by second mortgage as absolute payment of defendant's liability to him on the bank note. Such transaction is entirely consistent with an understanding that Cascaden should retain the bank note and hold the makers, Petree and the defendant, liable for the amount of the principal and interest he had paid thereon, in case he should not be able to collect the Beverage Company note given him for the same debt. Nor does the financing of the Beverage Company by Cascaden evidence any intention on the part of Cascaden or the company that Cascaden should release the defendant and Petree or either of them from their liability to him for the amount paid by him to the bank, unless the Beverage Company should pay its note which was secured by second mortgage. The

fact that the amount of that note was to be and was secured by second mortgage indicates a contrary intent, particularly in the light of the fact that Cascaden did not surrender the bank note to the makers, Petree and defendant. If the Beverage Company and Cascaden didn't consider that Petree's and the defendant's liability to Cascaden on account of the latter having paid the bank note was some security for such obligation, then why was not that debt to Cascaden included with the loan that Cascaden was to make the company, and the aggregate sum secured by one mortgage? Nor does the resolution provide for his surrender of the bank note to the principal makers or to the Beverage Company.

Defendant on page 7 of his brief, says that Cascaden paid the bank note before maturity. The record, however, shows that he did not pay the note until after maturity. That note, with the extension granted thereon, matured June 30, 1918, as stated on page 3 of defendant's brief. Plaintiff alleges in her complaint (par. V, Tr. 6 and 7), that defendant did not pay the note when it matured, and that thereafter, on the 25th day of June, 1918, Cascaden paid the note. In reply to such allegation, the defendant in the second paragraph of his amended

answer (Tr. 11), admits that Cascaden paid the note to the bank, but denies that he paid it at maturity or at any time prior to July 3, 1918. As further evidence that Cascaden did not pay the note before maturity, we call the court's attention to the fact that the Beverage Company's note to Cascaden is dated July 3, 1918. (Tr. 97.) The amount of the latter note is $3033.00, instead of $3030.00, which would have been the correct amount to reimburse Cascaden had he paid the bank note and interest at or before maturity, since the interest on the bank note is $30.00 per month. (Tr. 6.) It is evident that the plaintiff erred in her allegation that payment of the note was made on the 25th of June, 1918, because the note had not matured on that date, and she alleges in the same paragraph that it was not paid until after maturity. She obviously erred in her recollection as to the date of maturity. It is apparent, however, from the record, that Cascaden paid the bank note after the same matured, but before the Beverage Company executed its note to him, for the defendant testified (Tr. 29 and 30):

"A. Mr. Cascaden came up to the bottling works one day and he said: 'You will make out a note to me and a mortgage, I paid the note to the Farmers' Bank.' Mr. St. George stopped him on the street

and asked him about it, and he got sore about it and he paid it, and we transferred a mortgage on the bottling works to Mr. Cascaden then."

Defendant asserts (brief, pages 7 and 8), that plaintiff has mistaken her remedy as to her first cause of action, that her remedy as to that cause of action is an action on a contract of indemnity which the law implies, from the relation between the accommodating party and the part accommodated, but even if the contention of defendant in that respect be technically tenable, it can not be invoked for the first time in this court, because no objection was raised to the sufficiency of the allegations of the complaint, by demurrer or otherwise, in the trial court, and the complaint does state facts sufficient to constitute a cause of action on such implied contract of indemnity.

In *McDonough v. Nowlin*, 118 Pac. 463, at page 465, the court said:

"The complaint is somewhat ambiguous and uncertain in this regard, and had the defendant raised the point by demurrer, no doubt the complaint would have been amended so as to remove any ambiguity or uncertainty in the pleading.

"It was said in the case cited:

" 'Under our system of pleading, where all the facts of the transaction are set out, it can make

little difference in the generality of cases whether it be said that an accommodation maker or endorser who has been compelled to meet the obligation of his principal is entitled to sue upon the note, with a recovery limited to the amount he has expended, with legal interest, or whether it be said that his action is an assumpsit for money laid out on behalf of his principal and that his recovery is measured by the amount he has so expended, with legal interest.'

"The facts of the transaction are set out in the present case with sufficient fullness to support a judgment under the rule laid down in Yule v. Bishop, supra.

"The finding of the court that plaintiffs are the owners and holders of a promissory note and are entitled to judgment against defendant therefor was a superfluous and unnecessary finding. The other findings of fact are supported by the evidence and are sufficient to support the judgment."

In the case at bar the complaint alleges that the defendant, is the principal on the note, that Cascaden was a mere surety, that he was compelled to pay the note to the payee after maturity, that the defendant had not reimbursed him for the amount or any portion thereof that he had paid on the note. We submit that such a statement of facts, in the absence of any objection to the pleadings in the trial court, is sufficient to entitle plaintiff to a judgment on the implied relationship existing between a surety and a principal on a note.

Defendant states on page 9 of his brief, that the bank note was paid before maturity by the Beverage Company by and through Cascaden, and the note was delivered to the company's vice president, Cascaden. But, as we have shown, Cascaden paid the note after maturity and before he received the note for the same sum from the Beverage Company. Nor was the note delivered to the Beverage Company. Plaintiff testified that she found the note in Mr. Cascaden's private safety deposit box, and not among any papers belonging to the Beverage Company. (Tr. 79, 80.) The note was evidently placed in such safety deposit box before Cascaden was adjudged insane, which occurred on the 6th day of September, 1921 (Tr. 4, 5), and this action was not commenced until May 31, 1922. (Tr. 10.)

Why should the bank note have been delivered to the Beverage Company if it was by the parties considered paid by the giving of the Beverage Company note as contended by defendant? If such were the agreement or understanding between the parties, it should have been surrendered to the original makers, Petree and defendant.

Defendant says (brief page 11):

"If anyone has a right of action against Petree or Weber it is the Beverage Company—not Cascaden."

If such contention be tenable, then there must have been no agreement between Cascaden, defendant and the Beverage Company that the giving of the Beverage Company note to Cascaden was absolute payment of the obligation of Petree and defendant to Cascaden on account of the latter having paid the bank note.

In the absence of such an agreement or understanding the Beverage Company note must be considered only as conditional payment or additional security for the payment of Petree's and defendant's obligation to Cascaden, as insisted by plaintiff in her original brief (pages 27-31), where numerous authorities are cited which sustain her contention.

DEFENDANT'S COUNTER-CLAIM

On page 12 of his brief, defendant states:

"Weber (defendant) swore that this note was given to him by Petree for a bona fide indebtedness of Petree to him and that Petree induced Cascaden to join him as co-maker; that the note is due and has not been paid. (Tr. pp. 35, 36, 37.) This evidence is entirely uncontradicted."

We submit that defendant's testimony above referred to is contradicted by defendant's own admis-

sions to plaintiff (Tr. 71), and in support of such testimony the defendant testified as follows (Tr. 46, 47):

"Q. If you had asked for it? Why were you speaking about needing protection?

"A. Well, I told Mrs. Cascaden there was still three thousand dollars to be paid, and the firm took that debt over and put it on the books, but they never issued any security for it, and it is up to me to pay that. The way we started to talk about it at that time, Mrs. Cascaden came across to my gate and said, 'You know, Mr. Weber, Mr. Cascaden wanted me to deed your interest back to you after it is all settled and sold'—"

It is true the defendant doesn't state what firm was to assume the balance of the Allberg indebtedness, but it is fair to assume that the firm referred to was the Beverage Company, which was not organized at that time, but the parties at the time contemplated organizing such company. Defendant testified (Tr. 36):

"Q. But how did that note come to be given?

"A. I went outside—I left Fairbanks on the 6th of February.

"Q. What year?

"A. '18.

"Q. 1918?

"A. Yes, sir. I went to an institution in Milwaukee for brewers, who were scientific brewing companies. It was a short course on account of members all knowing their business, and they said they would teach all the methods of improving near-beer, and how to change a brewery plant, adapt it to the new methods we had to use in order to keep it going, and they decided I go out and take that course, and incidentally I bought some stuff and looked around. And on the day before I left, why, they figured up how we stood about our transaction with Mr. Petree and myself about shipping in that stuff and buying the bottling works, and Mr. Petree gave me that note."

And defendant again testified (Tr. 48):

"Q. You didn't ask Mr. Petree for any security for that note?

"A. No, because I thought it would be settled when they reorganized."

To whom does the defendant refer when he says "they decided I go out and take that course?" Evidently to Petree and Cascaden. Those three were the only parties interested in the organization of the Beverage Company, and such is the only reasonable interpretation to place upon the evidence in the record. The defendant testified that the company was to assume the Allberg note for $3000, but before the company was organized each one of the three members was willing to obligate himself to the

extent of one-third of the balance of the indebtedness to Allberg. Therefore, when defendant was coming outside he wanted a note from Petree and Cascaden for $2000 to indemnify him in case he was compelled to pay the Allberg note while he was outside.

It is clear that in contemplation of the organization of the Beverage Company and the assumption of the balance of the Allberg indebtedness by that company, Cascaden and Petree were willing to and did sign and deliver the $2000 note to the defendant to protect him against any sum he might be called upon to pay Allberg when he came outside, as defendant testified (Tr. 43), that he expected to meet Allberg when he came outside, and that Allberg would very likely endeavor to collect from him the balance due Allberg from Petree and the defendant. The testimony of the plaintiff to the effect that the defendant stated to her that the $2000 note was given defendant to secure him against liability on the Allberg note is abundantly corroborated by the testimony of the defendant and the facts and circumstances surrounding the transactions between Petree, defendant and Cascaden.

Defendant claims in his brief (page 10), that even if it be conceded that the $2000 note was

given defendant to secure him against liability on the Allberg note, that the latter note is still an outstanding obligation against defendant, as he says that note has never been delivered to him, although his counsel had such note in his possession at the time of the trial of this action.

We submit that the language of the admission of the defendant as testified to by plaintiff can have no other meaning than that Petree and Cascaden should not be liable to defendant on the $2000 note unless and until the latter should pay the Allberg note. Such interpretation of the defendant's admission is borne out by the defendant's testimony that the firm assumed that indebtedness. (Tr. 46, 47.) In any event the question was one of fact for the jury to answer, under all the facts and circumstances disclosed by the evidence.

We insist that the evidence shows that the Allberg note had been surrendered to the defendant prior to the trial, and that it was in his possession at that time. Defendant testified (Tr. 42), that the Allberg note had not been paid and that the note was then in the possession of his counsel, Mr. Roth, and the latter stated near the close of the trial (Tr. 82), that the Allberg note was then in his (Roth's) possession.

Defendant contends in his brief (pages 15 and 16), that such admissions by himself and his counsel as to the latter's possession of the Allberg note are not proof that the note had been surrendered to defendant, because defendant insists that his counsel might be holding the note for collection. If such were the fact, it is safe to assume that both defendant and his counsel would have so testified. Their silence on that proposition warrants the inference that Mr. Roth was holding the note for defendant. They were both in court at the time of the trial. The man against whose estate the defendant was endeavoring to recover a judgment was in a hospital for the insane, more than 2000 miles from the place of trial. Common honesty should have prompted the defendant to acquaint the court and jury with all the material facts in his possession. If he failed to do so, doubtful questions of fact should not be interpreted in his favor. The Alaskan Statute, section 1505, Compiled Laws of the Territory of Alaska, 1913, provides among other things:

"Sixth. That evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict; and therefore

"Seventh. That if the weaker and less satisfactory evidence is offered, when it appears that strong-

er and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust."

The foregoing section of the statute is certainly applicable to the testimony of the defendant in the case at bar. He was the one person of all others who was in a position to recite in detail the history of all of the transactions between himself and Cascaden. As the record discloses, the plaintiff was under the disadvantage of being compelled to rely on whatever records of her husband's she could find, and on the admissions and declarations made by the defendant before the trial.

Defendant's last contention is that the note pleaded by him as a counter-claim is an unconditional written promise to pay at a certain time, and that no parole evidence can graft upon a written contract any condition as to the time of payment, other than that which appears in the writing. We insist, however, that the oral evidence was not offered or received for the purpose of adding to or varying any of the terms of the note, but such evidence was offered and received to explain why such note was given, and parole evidence is always admissible for such purpose.

22 C. J., Sec. 1559, p. 1164.

The evidence in the record shows that the $2000 note was merely given to the defendant by Cascaden and Petree to indemnify the defendant against liability on the Allberg note. A bond might have been given for the same purpose, but evidently the giving of the note seemed a simpler method for the protection of the defendant.

We respectfully submit that the judgment of the trial court should be set aside and a new trial granted.

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